WISMA MPL JMB

v.

MALAYSIA PACIFIC CORPORATION BHD

HIGH COURT MALAYA, KUALA LUMPUR
ZABARIAH MOHD YUSOF J
[CIVIL SUIT NO: S-22NCVC-975-10/2011]
28 AUGUST 2012

CONTRACT: *Estoppel - Estoppel by conduct - Developer owning parcels in stratified building disputed liability to pay maintenance/ management charges to Joint Management Body (JMB) - Developer had made previous such payments to JMB and attended JMB meetings without questioning its status - Whether developer estopped from denying liability to pay outstanding charges - Capacity to sue - Building and Common Property (Maintenance and Management) Act 2007*

The plaintiff was the Joint Management Body ('JMB') of Wisma MPL, which was developed by the defendant. The defendant owned the majority of the parcels in the building but had failed to pay the plaintiff maintenance and management charges amounting to about RM1.3m claimed by the plaintiff in the instant suit. Although the defendant was one of the 12 members of the JMB of the plaintiff and had attended all the plaintiff's annual general meetings without raising any objection to that effect, it claimed that the plaintiff was not properly constituted under the Building and Common Property (Maintenance and Management) Act 2007 ('Act 663') and therefore did not have the capacity to commence the instant action. The defendant claimed that although a certificate of fitness ('CF') for occupation had been issued to Wisma MPL, since the development of the building had yet to be fully completed as per the approved plans, the establishment of the JMB was premature. Apart from that argument, the defendant also claimed that, as a developer, it was excluded from the term 'purchaser' under Act 663 and hence was excluded from paying maintenance charges. The defendant raised a counterclaim alleging *inter alia* that because of the plaintiff's failure/negligence in carrying out its duties and obligations, the defendant had suffered loss. It quantified its special damages claim at RM2.2m but also asked for general, aggravated and exemplary damages. The defendant argued Wisma MPL had become dilapidated, adversely affecting its rental

and occupancy rates and that due to poor security there had been many cases of break-ins, thefts and burglaries which had caused tenants, including the defendant's, to prematurely terminate their tenancies.

Held (allowing claim with costs and dismissing counterclaim with costs):

(1) The plaintiff was a duly constituted body and had the requisite capacity to institute the instant action against the defendant. Wisma MPL was a completed building and with the issuance of the CF by the relevant authorities the defendant's denial of the validity of the plaintiff's formation was misconceived and unsubstantiated. Section 8(8) of the Strata Titles Act 1985 provided that the date on which a building was completed was the date on which it was certified by any local authority to be fit for occupation or use. (paras 49, 67 & 73)

(2) Not only had the defendant been diligently attending all the AGMs of the plaintiff, it had also been paying the plaintiff some, although not in full, the maintenance charges in respect of the defendant's lots in Wisma MPL without a whimper on the validity or legality of the plaintiff's formation. (para 56)

(3) By its conduct in having made maintenance payments to the plaintiff and having requested for indulgence in settling the outstanding charges, the defendant was estopped both from denying it was a purchaser under Act 663 and also from denying its liability to pay the outstanding maintenance charges. (paras 25, 87-88)

(4) The defendant had not proven the plaintiff had been negligent in managing the building or that the alleged losses and damages suffered by the defendant was caused by the plaintiff's negligence. No evidence was tendered to support the counterclaim for loss and damages. (paras 114, 116-117)

Case(s) referred to:

Anjalai Ammal & Anor v. Abdul Kareem [1968] 1 LNS 8 FC ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Debir Desa Development Sdn Bhd v. Pesuruhjaya Bangunan Kuala Lumpur & Ors [2009] 5 CLJ 563 HC ***(refd)***

Janagi v. Ong Boon Kiat [1971] 1 LNS 42 HC ***(refd)***

Lee Ah Chor v. Southern Bank Bhd [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 SC ***(refd)***

Legislation referred to:
Building and Common Property (Maintenance and Management) Act 2007, ss. 2, 4(1)(a), 7(2), 8(2)(a), 15, 23(1), 44
Evidence Act 1950, ss. 90A, 101, 102, 103
Strata Titles Act 1985, ss. 4, 7(3), 8(8)(a), 39(1), 45

For the plaintiff - GC Tan (Zf Phua with him); M/s Shook Lin & Bok
For the defendant - Devanathan; M/s Devanathan

Reported by Ashok Kumar

JUDGMENT

Zabariah Mohd Yusof J:

[1] The plaintiff's claim against the defendant is for the alleged outstanding charges for the maintenance and management charges of the common property in Wisma MPL in the sum of RM3,083,639.32 as of 30 April 2011.

Background

[2] The plaintiff is a Joint Management Body (JMB) of Wisma MPL.

[3] According to the plaintiff, the JMB was established under the Building and Common Property (Maintenance and Management) Act 2007 (hereinafter referred to as "Act 663"). This fact is being disputed by the defendant.

[4] The defendant is the developer of Wisma MPL and owns a majority of units in the podium block (50.23%) and the entire Tower Block of Wisma MPL, ie:

(i) 50 of the larger units in the podium block;

(ii) Defendant's related company, ASA Enterprise Sdn Bhd owns 27 of the larger units of the podium block in Wisma MPL.

[5] The plaintiff had served written notices dated 26 August 2010, 27 September 2010 and 14 October 2010 on the defendant requesting for payment of outstanding maintenance charges.

[6] *Vide* letters dated 15 March 2011 and 13 July 2011 which was issued by the plaintiff's solicitors herein, Messrs Shook Lin & Bok, the plaintiff demanded from the defendant payment of outstanding maintenance charges.

[7] The defendant is one of the members of the Joint Management Committee (JMC) of the plaintiff out of 12 members.

[8] The defendant in its defence and counterclaim disputes the validity of the plaintiff as being properly constituted under Act 663. The defendant contends that the formation and the constitution of the plaintiff under Act 663 is invalid, unlawful and/or premature. Therefore the defendant is challenging that the plaintiff does not even have the capacity to sue in the suit herein.

[9] Without prejudice to the defendant's rights to challenge the constitution of the plaintiff and to bring this suit, the defendant also disputes and denies the sum claimed by the plaintiff. It was contended by the defendant that the amount claimed herein by the plaintiff is inaccurate, excessive, unreasonable and did not take into account the utilities bill and other payments which were paid by the defendant on behalf of the plaintiff.

[10] The defendant counterclaims and set off against the plaintiff for its failure to carry out its duties and obligations and/or being negligent in discharging its duties and obligations under Act 663, namely:

(i) failing to provide proper and/or adequate security services to Wisma MPL resulting in numerous incidents and burglaries;

(ii) failing to maintain the common property and keep it in a state of good and serviceable repair resulting in leaky roofs, walls and window panes;

(iii) failing to properly manage the funds collected from the parcel owners of Wisma MPL;

(iv) failing to have proper regard to the views of directors of the defendant/developer as being the owner of majority parcels in Wisma MPL;

(v) failing to act in the interest of the defendant.

[11] The defendant also contends that the plaintiff, through the JMC has acted in a manner in abuse of power and/or conflict and/or bad faith when enforcing the House Rules in Wisma MPL.

[12] The defendant contend that the JMC allowed the use of units in the podium block as offices/or store rooms in total disregard of the relevant provisions (House Rules) and spirit of the Deed of Mutual Covenants.

[13] As a result of the plaintiff's failure and/or negligent in carrying out its duties and obligations, the defendant suffered loss, namely:

(a) wisma MPL has been rendered in a dilapidated state/condition, which in turn affected its rental and occupancy rate;

(b) the defendant's tenants have prematurely terminated their tenancies due to repeated incidents provided by the plaintiff. The loss and damage suffered by the defendant is approximately RM2,105,104.20;

(c) the defendant was sued by a tenant and judgment entered against the defendant for the sum of RM28,683.48 due to a break-in at the tenant's office. This was caused by the poor security services provided by the plaintiff.

[14] Therefore the defendant counterclaims against the defendant, namely:

(i) a declaration that the plaintiff is not duly constituted and properly constituted under Act 663;

(ii) special damages in the sum of RM2,105,041,20;

(iii) special damages in the sum of RM2,105,041.20;

(iv) general damages, aggravated damages and/or exemplary damages; and

(v) interest and costs.

[15] The main issues that arises from the above are:

(i) whether the plaintiff is a duly constituted Joint Management Body under the Building and Common Property (Maintenance and Management) Act 2007 (Act 663);

A (ii) whether the defendant is statutorily liable to pay the plaintiff the charges for the maintenance and management of the common property (the maintenance charges) in Wisma MPL;

(iii) whether the plaintiff has been negligent/fail in carrying out its
B duties.

The Court's Findings

Whether the Defendant is a Purchaser as Defined under s. 23 of Act 663

C **[16]** The defendant raises the issue that the defendant, as a developer does not fall within the term "purchaser" under Act 663 and hence is excluded from payment of maintenance charges under the same.

D **[17]** Section 23 of Act 663 expressly provides that the purchaser of parcels in a building intended for subdivision into parcels shall pay the charges for the maintenance and management of the common property.

[18] The usage of the word "shall" connotes a mandatory
E requirement for a purchaser of the parcels in Wisma MPL to pay for charges and maintenance for the management of common property in Wisma MPL.

[19] The defendant argued that it is not a purchaser but a
F developer hence it is not caught by the mandatory provisions of the Act which stipulates the requirement upon a "purchaser" of which the defendant is not.

[20] However, this argument by the defendant that it is not a
G purchaser fails because firstly, the defendant at para. 3 of its statement of defence had admitted to the averments in para. 4 of the statement of claim of which is stated herein:

> 4. The defendant is the purchaser of the following parcels in the said Building ... (para. 4 of the statement of claim)
>
> 3. Paragraphs 4 of the Statement of Claim is admitted ... (para. 3 of the statement of defence)

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[21] Since the defendant had admitted in their pleadings, the defendant cannot deviate from their pleadings.

I

[22] It is trite law that parties are bound by their pleadings and where the facts have not been raised in their pleadings they are not allowed to be raised as this will catch the other party by surprise. A

- *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239; B

- *Janagi v. Ong Boon Kiat* [1971] 1 LNS 42;

- *Anjalai Ammal & Anor v. Abdul Kareem* [1968] 1 LNS 8.

C

[23] Secondly, it is an agreed fact between the plaintiff and the defendant that the defendant is the purchaser of the parcels as specified in para. (iii) of the agreed facts which is at bundle G.

[24] Thirdly, it is an undisputed fact that the defendant had been paying maintenance charges in respect of the units to the plaintiff, although not in full, since the formation of the plaintiff. If indeed the defendant is not the purchaser of the said units in Wisma MPL, then why pay the maintenance charges at all. D

[25] By the conduct of the defendant in making the maintenance payments to the plaintiff, the defendant is stopped from denying it is the purchaser and caught under the Act. E

[26] Hence, it is clear that the argument by the defendant that it is a developer and not a purchaser as mentioned in Act 663, flies in the face of the defendant. F

[27] Further, even if one is developer, it can also be a purchaser, hence that does not mean that it is precluded from the provisions of the Act 663. The word "purchaser" in Act 663 is not to be interpreted to exclude developers such as the defendant herein who is also the owners/purchaser of majority of the units/ parcels in Wisma MPL. G

[28] It is to be noted from the preamble of Act 663, that the objective of Act 663 is "to provide for the proper maintenance and management of buildings and common property, and for matters incidental thereto". H

[29] For the proper maintenance and management of buildings, charges has to be levied on owners of the units or parcels. If developers like the defendant who owns a majority of the I

parcels or units are excluded from payment of the maintenance charges, how is the plaintiff to maintain the building as the defendant and its tenants would be using the property without payment of maintenance charges, whilst the defendant would be enjoying benefits of the rentals from the respective units/parcels. This is manifestly unjust and cannot be intention of the said Act.

[30] From the reading of Act 663 and the Strata Titles Act 1985 (Act 318), a JMB will be automatically dissolved within three months from the date of the first meeting of the management corporation of the building in question pursuant to s. 15 of Act 663.

[31] Management corporation is defined under s. 2 of the Act 663 as the management corporation is established under Act 318.

[32] Section 39(1) of Act 318 provides that "upon the opening of a book of the strata register in respect of a subdivided building or land there shall, by the operation of this section, come into existence a management corporation consisting of all parcel proprietors including in the case of phased development, the proprietor of the provisional block or blocks.

[33] Section 4 of Act 318 defines what is meant by the word "parcel" and "proprietor".

[34] From the definitions, it infer that upon issuance of the strata titles to proprietors of lots in Wisma MPL, all these parcel proprietors including the defendant would then have to pay contributions to the management fund to meet the administrative expenses as may be incurred for the purposes of controlling, managing and administering the common property, paying rent, rates and premiums of insurance and discharging any other obligation of the management corporation (pursuant to s. 45 of the Act 318).

[35] Following thereto, the defendant would have to contribute to the management fund as and when the management corporation is formed, notwithstanding the defendant's status as developer of Wisma MPL. This is because the defendant, as purchasers would be parcel proprietors within the meaning of Act 318.

[36] The defendant submits that the plaintiff failed to cross-examine the defendant's witnesses on the issue of whether the defendant is a developer, however this is a non-issue in view of the admission of the defendant in its pleadings that it is a purchaser of the units/parcels.

Whether the Plaintiff is a Duly Constituted Joint Management Body under the Building and Common Property (Maintenance And Management) Act 2007 (Act 2003)

[37] The defendant submits that the plaintiff's constitution or formation is invalid and unlawful under Act 663. The reason being, the property/building in question, ie, Wisma MPL is still under development and has yet to be completed.

[38] The defendant contends that, *via* the testimony of its witnesses, it has been established that Wisma MPL is still an ongoing development, being developed and yet to be completed.

[39] It is further argued that s. 4 of Act 663 provides that the Joint Management Body (the plaintiff) can only be established when the building or land intended for subdivision has been completed. Based on the facts the defendant submits that Wisma MPL is incomplete and is still under development. A reading of s. 4 will reaffirm this propositions which provides:

> (1) Where a building or land intended for subdivision into parcels has been completed ...

[40] The defendant also submits that there is evidence before this court that the defendant is currently embarking on the development of Wisma MPL. Wisma MPL was approved as a 23 storey building whereas it is presently constructed at only 21 storeys. A 50 storey office cum residential tower project is under development at Wisma MPL (exh. D38 and D40).

[41] It was submitted by the defendant that the plaintiff is aware of the non completion and/or development of Wisma MPL. The plaintiff never objected to the development of Wisma MPL.

[42] It was also further submitted by the defendant that although Wisma MPL is not completed, the defendant, under the wrong advice by its then legal counsel initiated the formation of the plaintiff (JMB). The defendant was also wrongly advised by its legal counsel then, that the failure to form the JMB soonest would result in the defendant being liable to pay a hefty fine.

[43] It is further evident before this court that the defendant, being ignorant on the correct interpretation of Act 663 at the material time, had relied on the wrong advice rendered by the defendant's then legal counsel and proceeded with the setting up of the plaintiff (JMB).

[44] Therefore based on the defendant's witness, Encik Faridz bin Mohd Nor and the documents that Wisma MPL is still not a completed building and subject to further developments despite the issuance of CF. Encik Mohd Faridz have stated that CF could be issued on part completed buildings while a building is still under development.

[45] Therefore the defendant submits that based on s. 4 of Act 663, the plaintiff is not a duly and lawfully constituted body under Act 663 and its formation is premature as the building is still under construction. The defendant referred to the case of *Debir Desa Development Sdn Bhd v. Pesuruhjaya Bangunan, Kuala Lumpur & Ors* [2009] 5 CLJ 563 where it was held that:

> ... to fully appreciate the practical application of the aforesaid s. 4(1)(a), a closer analysis of s. 4 of the 2007 Act as a whole is unavoidable.
>
> The subject matter of the said s. 4 is styled as "the Establishment of a Joint Management Body (ie, JMB)". As to "when" that "establishment" is required to be established is provided by subsection (1) of the said s. 4. It is statutorily required where "... A building or land intended for subdivision into parcels has been completed - "If it is not completed, then the said s. 4 is not applicable ..."

[46] On this issue of whether the plaintiff is a proper constituted body under Act 663 it is pertinent to look at the provisions of Act 663.

[47] Section 4(1) of the same provides that:

> Where a building or land intended for subdivision into parcels has been completed and vacant possession of parcels has been delivered to purchasers before the commencement of Act 663, a joint management body shall be established consisting of the developer and the purchasers upon the convening of the first meeting not later than 12 months from the commencement of Act 663.

[48] It is to be noted that the date of commencement of Act 663 in the Federal Territory of Kuala Lumpur is on 6 April 2007. A

[49] Act 663 was enacted to provide protection to purchasers pending the issuance of strata titles, therefore it is pertinent to refer to the Strata Titles Act 1985 especially s. 8(8)(a) whereby it B provides that the date on which a building is completed shall be the date on which it is certified by any local authority to be fit for occupation or use or certified in accordance with the provisions of any written law for the time being in force.

C

[50] Exhibit P4 at p. 44 of bundle C1 shows that Kuala Lumpur City Hall had issued to the defendant a Certificate of Fitness for the Occupation of Buildings dated 17 March 1983 certifying that Wisma MPL is fit for occupation and use.

[51] The defendant had convened the first meeting of the D purchasers of lots in Wisma MPL on 5 April 2008 in accordance with s. 4(1) of Act 663, so as to form the Joint Management Body of Wisma MPL, ie, the plaintiff.

(refer to the plaintiff's first Annual General Meeting on 5 April E 2008 in exh. P2 at pp. 45-46 of bundle C1).

[52] The Commissioner of Buildings issued a certificate dated 27 May 2008 (exh. P1 at p. 104 of bundle D) certifying that the plaintiff was duly constituted on 5 April 2008 pursuant to s. 7(2) F of Act 663.

[53] On record there have been four AGMs of the plaintiff and the defendant attended all of them. In the said AGMs, never once had the defendant raised objection to the validity of the formation or the constitution of the plaintiff during any of the subsequent G AGMs after the formation of the plaintiff.

[54] Until the date of the trial, the defendant had also not raised any objection to the formation of the plaintiff.

H

[55] Going through the evidence of the defence witnesses especially DW1, DW2 and DW4, their evidence do not establish that Wisma MPL is not a completed building.

[56] Not only had the defendant been diligently attending all the AGMs of the plaintiff, the defendant had also been paying to the I plaintiff some, although not in full, the maintenance charges in respect of the defendant's lots in Wisma MPL, without a whimper on the validity or legality of the formation of the plaintiff.

[57] The contention of the defendant that Wisma MPL is a non completed building also runs contrary to the evidence from its own witness.

[58] DW1 in cross-examination said that:

Q : I therefore put to you that Wisma MPL is a completed building in the light of the issuance of the CF?

A : I agree that Wisma MPL is completed but not the development.

Q : And I also put it to you that Wisma MPK, formerly known as Wisma MPI, is completed in 17.3.1983, as stated in the CF I've just shown you.

A : Yes.

[59] DW4 also said in evidence that a full CF is issued by the local authorities when all the development of the building is completed and the CF issued for Wisma MPL is a full CF.

[60] DW1's dispute that the development of Wisma MPL had been completed is contradicted by the evidence of DW4, the defendant's former in-house architect who testified that a full CF is issued by the local authority when all development of the building is completed.

[61] In any event s. 4(1) of the Act 663 refers to completion of a "building" and not "development".

[62] Similarly, s. 8(8) of Strata Titles Act refers to "building" and not "development".

[63] The defendant's witnesses testified that the defendant plans to redevelop Wisma MPL which they named as the Red Sails Project and according to them these plans proved that Wisma MPL is not a completed building.

[64] If one is to peruse at the approval by Kuala Lumpur City Hall in respect of the layout plan for the Red Sails Project (exh. D40), it had already lapsed on 30 May 2008. This fact is admitted by DW2 and DW4 during cross-examination.

[65] In any event "redevelopment" does not connote incomplete. The Oxford Dictionary states that it means to develop again. A building may be complete and it can be redevelop, but that does not mean that a completed building became incomplete just because the owner wishes to have it redevelop.

[66] Hence the argument by the defendant that the redevelopment means that Wisma MPL is an uncompleted building is a non-starter.

[67] Further, in the light of the admission by the defendant's own witness, DW1, that Wisma MPL is a completed building and the issuance of the CF by the relevant authorities, it is clear that the denial by the defendant of the validity of the formation of the plaintiff is misconceived and unsubstantiated.

[68] The defendant's excuses that it was wrongly advised by its then legal counsel on the formation of the JMB are mere afterthoughts and unsubstantiated, as a last minute ditch to avoid paying the maintenance charges to the plaintiff.

[69] The defendant also submits that no strata titles have been issued for the purchasers of lots in Wisma MPL which goes to show that Wisma MPL has not been completed yet.

[70] However this submission by the defendant is clearly misconceived. The non issuance of strata titles merely proves that the defendant has taken no steps to apply for the issuance of strata titles despite the passage of 29 years since the issuance of the CF for Wisma MPL, in breach of the defendant's statutory duty to do so under s. 8 of Act 318.

[71] Further, s. 7(3) of Act 318 provides that an application for subdivision of a building into parcels may be made notwithstanding that no certificate of completion and compliance has been issued for the building.

[72] The case of *Debir Desa* cited by the defendant can be distinguished on its facts. That case is with regard to the validity of the establishment of the JMB under s. 4(1)(a) of Act 663 in the light of the incorporation of the management corporation by virtue of s. 39 of Act 318. Further, the learned High Court Judge dismissed the applicant's application to challenge the validity of the establishment of the joint management body as the latter had fulfilled the three essential ingredients of s. 4(1)(a) of Act 663.

[73] Therefore, based on the aforementioned, the plaintiff is a duly constituted body and have the requisite capacity to institute this action against the defendant.

Whether the Defendant is Statutorily Liable to Pay the Plaintiff the Charges for the Maintenance and Management of the Common Property (The Maintenance Charges) in Wisma MPL

[74] Section 23(1) of Act 663 (read with ss. 2 and 4 of Act 663) expressly provides that the purchaser of parcels in a building intended for subdivision into parcels shall pay the charges for the maintenance and management of the common property.

[75] Given the usage of the word "shall" in s. 23 of the same, it is mandatory for the defendant, as purchaser of 69 parcels or units in Wisma MPL to pay for the charges for the maintenance and management of the common property in Wisma MPL. This liability is provided by statute as against the defendant as purchasers of units in Wisma MPL, which is a strict liability, regardless of the facilities provided.

[76] The plaintiff is given the authority to collect the maintenance charges from the defendant pursuant to s. 8(2)(a) of Act 663 which provides as follows:

> The powers of the Body shall include the following:
>
> (a) To collect from purchasers maintenance and management charges in proportion to the allocated share units of their respective parcels.

Rates of Maintenance Charges

[77] The defendant contends that the maintenance charges payable by the purchasers of Wisma MPL are excessive and unreasonable.

[78] The rates of the maintenance charges of Wisma MPL are as follows:

(a) Shopping Podium Block

(i) Service Charges	RM1.20 per sq foot per month
(ii) Sinking Fund	RM0.10. per sq foot per month

(b) Office Tower Block

(i) Service Charges	RM0.90 per sq foot per month
(ii) Sinking Fund	RM0.10 per sq foot per month

[79] What is interesting to note is that the abovesaid rates are the same rates that was imposed by the defendant when the defendant was maintaining and managing Wisma MPL *vide* its subsidiary company, Premier Building Management Services Sdn Bhd.

- Refer to para. 2 of the minutes of meeting of the JMC dated 18 June 2008 (p. 12 bundle B).

- Circular dated 23 August 2007 issued by Premier Building Management Services Sdn Bhd at exh. P7 at p. 87 of bundle C1.

[80] It therefore does not make sense that the defendant is complaining of excessive rates when the same rate was imposed by them. In any event the complaint was only raised almost 3 1/2 years after the formation of the plaintiff, and after the plaintiff's letter of demand dated 15 March 2011 and 13 July 2011.

[81] Clearly the complaint that the rates is unreasonable is an afterthought.

Utility Bills, Quit Rent and Insurance

[82] The defendant contends that the defendant had paid utility bills for the common property in Wisma MPL, quit rent and insurance on behalf of the plaintiff and the plaintiff failed to take this into account in its claim against the defendant. In the light of this fact, the defendant maintains that the claim by the defendant against the defendant is inaccurate.

[83] On this point, PW3, the accounts manager of the managing agent of Wisma MPL testified that the payments of the utility bills, quit rent and insurance of Wisma MPL by the defendant on behalf of the plaintiff have been taken into account by way of contra as shown in the statement of accounts in respect of the defendant's parcels.

[84] In the testimony of PW3, he said that the sum appearing in the brackets in the statement of accounts (at p. 351 bundle D) shows the deduction of the payments made by the defendant on behalf of the plaintiff in respect of the utility bills, quit rent and insurance.

- Refer to statement of accounts as at 30 April 2011 at exh. P33 at pp. 351-421 of bundle D.

- Certificate pursuant to s. 90A of Evidence Act 1950 dated 8 February 2010 in respect of the statement of accounts as at 30 April 2011 at exh. P34 at p. 100 of bundle C2.

[85] In any event the allegation of the defendant that the plaintiff failed to take into account the payments made by the defendants on behalf of the plaintiff, must be proven by the defendant as, he who alleges must prove (refer to ss. 101 - 103 of the Evidence Act 1950).

Defendant's Request for Indulgence to Pay Maintenance Charges to the Plaintiff

[86] It is in evidence *vide* the testimony of PW1 that the issue of the defendant's outstanding maintenance charges was raised during many of the JMC meetings, including on 17 December 2009 (p. 37 of bundle B), 12 October 2010 (p. 44 bundle B), 19 April 2011 (p. 48 bundle B), 8 June 2011 (p. 51 bundle B), 12 July 2011 (p. 54 of bundle B) and 6 September 2011 (pp. 63-64 bundle B).

[87] The defendant in fact had admitted owing to the plaintiff the outstanding charges and had made several proposals to the plaintiff to settle the said outstanding maintenance charges. This was said by the defendant at the JMC Meetings on 25 May 2010 (p. 40 bundle B), 19 April 2011 (p. 48 bundle B) and 9 August 2011 (pp. 63-64 bundle B).

[88] Hence the defendant is now estopped from denying its liability to pay the outstanding maintenance charges in the light of such admission.

[89] Refer to *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283.

Whether Late Payment Interest of 10% Per Annum is Payable by the Said Purchasers Who are in Arrears of the Maintenance Charges

[90] The late payment interest of 10% per annum payable by purchasers who are in arrears of the maintenance charges was unanimously agreed by all purchasers who had attended the first AGM of the plaintiff. (refer to exh. P2 at p. 45A at bundle C1).

[91] The defendant was well represented by its CEO, Dato Bill Ch'ng Poh during the first AGM of the plaintiff and no objection was raised by him concerning the rate or the imposition of the late payment interest.

[92] Hence this issue raised by the defendant is another afterthought.

Whether the Defendant's Ownership of Majority of the Units have a Bearing on the Plaintiff's Duty to Carry out its Functions

[93] It does not matter how many parcels one owns in Wisma MPL and it does not have any bearing on the duty of the plaintiff to carry out its function under the Act 663. The duty of the plaintiff is to all parcel purchasers of Wisma MPL and not to the defendant alone although the defendant owns a substantial number of parcels in Wisma MPL.

[94] Therefore the plaintiff is not obliged to have regard to the wishes and directions of the defendant alone despite the defendant having a majority number of parcels in the said building. There is nothing in the law that stipulates as such.

Whether the plaintiff and its Managing Agent Failed to Carry Out its Duties and Obligations under Act 663

[95] The defendant complained:

(i) That the plaintiff failed in maintaining the standards of maintenance and management of Wisma MPL;

(ii) The failure of the plaintiff failure in providing proper or adequate security services to Wisma MPL, resulting in numerous incidents and burglaries in Wisma MPL.

[96] As far as the first complaint by the defendant is concerned, it is undisputed that the defendant is the owner of a substantial number of lots and parcels in Wisma MPL. Therefore the amount of the maintenance charges payable by the defendant forms the bulk of the charges payable by all purchasers in Wisma MPL. For the plaintiff to sustain itself in maintaining the daily running of the building, it is crucial that punctual payments of the maintenance charges be made by all parcel owners. The defendant has failed, refused and/or neglected to pay the plaintiff the

outstanding maintenance charges claimed in the suit herein. Hence the plaintiff is deprived of a large chunk of the maintenance charges by the refusal of the defendant to pay the maintenance charges.

[97] It was in evidence through the testimony of PW1 and PW2 that the common properties in Wisma MPL were in poor condition due to the age of Wisma MPL, which was more or less 34 years old at the material time. This is also partly due to the fact that it was poorly maintained by the developer of Wisma MPL, ie, the defendant, prior to the formation of the plaintiff.

[98] The managing agent had inspected the common property in Wisma MPL between November and December 2008 and the report disclosed that several equipments which was crucial to ensure the smooth operation of Wisma MPL were found to be dysfunctional or missing, eg, compressors and chillers for the air conditioning system of Wisma MPL, in which a few compressors were found missing since 2004.

[99] It was also through the evidence of PW1 that testified that the JMC of Wisma MPL did in fact received complaints about the maintenance of Wisma MPL such as the air conditioning system, the fire fighting system and the deteriorating aspect of Wisma MPL. PW1 explained the reason for the poor maintenance of Wisma MPL was due to the fact that the plaintiff is currently facing a shortage of funds to refurbish, repair and replace the common property in Wisma MPL. As was stated earlier the defendant is also to be blamed for this as the defendant owns a substantial number of units in Wisma MPL and yet refused to pay the maintenance charges to the plaintiff.

[100] It was submitted on behalf of the plaintiff that the plaintiff requires substantial amount of funds to carry out plans to upgrade the common property of Wisma MPL and also to hire professional cleaning companies and managing agents and security firms for the smooth operation of Wisma MPL.

[101] Through the evidence of PW1, he testified that the contractual services hired to maintain the service of the air conditioning, elevators and escalators, fire fighting system, the cooling tower system, security, pest control, landscaping, garbage and refuse collection costs the plaintiff an approximate sum of RM80,000 per month.

[102] PW3 also said in his testimony that between 1 April 2011 until 23 December 2011, RM1,662,946.49 was spent to maintain and manage MPL and as at 29 February 2012, the cash balance of the plaintiff is only RM276,965.04.

[103] It was also presented during the plaintiff's fourth AGM that major upgrading works to improve the condition of Wisma MPL such as replacing the chiller unit, constructing a new cooling tower to replace the old cooling tower which was dysfunctional, replacing the switchgear which forms a major component of the electrical supply to Wisma MPL and refurbishing washrooms in Wisma MPL, which was done in stages would costs a lot of money.

[104] It is undisputed that the defendant was well aware of the amount of funds required to carry out the aid major upgrading works as the defendant's representatives, one Mr Leong Choong Wah and one Cik Asmarani bt Asmuni were present at the plaintiff's fourth AGM.

[105] With regard to the complaint of the plaintiff's failure in providing adequate security services to Wisma MPL, resulting in numerous incidents and burglaries in Wisma MPL, it is to be noted that there were problems of break-ins even when the defendant was managing Wisma MPL, ie, burglary in unit occupied by one Kaliba Sdn Bhd on 5 March 2008.

[106] Further it was the defendant which had contributed to the breach of security in the building. This is due to several units which are being owned by the defendant which are currently occupied by entertainment outlets. The presence of these entertainment outlets in Wisma MPL who are tenants of the defendant was the main contributing factor leading to the breaches of security in Wisma MPL, namely burglaries and the break-ins.

[107] It was in evidence that after reports of burglaries and break-ins namely on 21 January 2010 in two units occupied by Messrs Ghazi & Lim and Koperasi Perunding Takaful Ikhlas Malaysia Berhad, the plaintiff and the managing agent had issued letters to the defendant to inform them that the plaintiff had decided to implement a registration system with the security guards at the ground floor counter for tenants and visitors to Wisma MPL after working hours, ie, 8pm on daily basis and also to program two elevators so that they would be open at a certain designated floors only.

[108] However these security measures by the plaintiff were opposed by the defendant and its tenants (operating entertainment outlets situated on the ground. 1st, 3rd, 4th, 5th , 6th and 7th floors of the Tower Block in Wisma MPL) on grounds that the said measure affected their business.

[109] It is also in evidence that the plaintiff has taken various measures to improve the security level in Wisma MPL which consists of the following:

(i) The plaintiff had instructed the managing agent to conduct more frequent assessments of the security firms hired and if the security services provided are not satisfactory and there are no improvement by the security firms despite warnings issued, the services of the said security firm will be terminated by the plaintiff;

(ii) The plaintiff had installed additional closed-circuit television cameras in Wisma MPL and the CCTVs are located on every floor in the podium and the Tower Block, including the elevators, stairways and corridors. The security guards would be monitoring the footages which are being captured by the CCTVs in real time live viewing through monitors in the control room which is located at Basement 1.

(iii) The plaintiff had been hiring two additional security supervisors solely to oversee the security guards on behalf of the management since the beginning of 2011.

[110] The defendant contended that the adoption of the House Rules by the plaintiff is an abuse of power, a conflict of interest and done in bad faith. On this issue it is to be noted that the House Rules of the plaintiff was approved by the JMC during its monthly meeting on 25 May 2010 and the defendant as represented by one James Ma and one Norlyn Kamal Basha at the said meeting. The defendant did not raise any objections with regards to the provisions of the House Rules during the said meeting on 25 May 2010.

[111] It is to be noted that s. 44 of Act 663 states that on the coming into operation of the Act, the provisions of any written law, contracts or deeds relating to the maintenance and management of buildings and common property in so far as they are contrary to the provisions of Act 663, shall cease to have effect.

[112] Moreover the plaintiff is empowered by s. 8(2) of Act 663 to make House Rules for the proper maintenance and management of Wisma MPL.

[113] Therefore the contention of the defendant that the Deed of Mutual Covenants between the defendant and the purchasers prevails over the House Rules is certainly misconceived in law.

Whether the Defendant is Entitled to Set Off Damages which it Alleges it Suffered Arising from the Alleged Negligence of the Plaintiff Against the Outstanding Maintenance Charges Claimed by the Plaintiff

[114] First of all the defendant has not proven that there was negligence on the part of the plaintiff in managing the building.

[115] The fact that the defendant has set out the various complaints and poor maintenance of the building is no excuse for the defendant to avoid liability in paying the maintenance charges to the plaintiff.

[116] In any event the defendant has not proven the alleged loss and damages suffered by the defendant which was allegedly caused by negligence of the plaintiff.

[117] There was no documentary evidence tendered in court to support the defendant's contention that it had suffered loss and damages as claimed in the defendant's counterclaim against the plaintiff.

[118] DW3 in his evidence during cross-examination agreed that the defendant did not suffer loss of rental amounting to RM2,105,041.20 as pleaded in the counterclaim as the premises were not rented out by the defendant.

Conclusion

[119] Therefore from the aforesaid, the plaintiff has proven its claim and judgment is entered against the defendant in the sums as stated in the statement of claim with costs.

[120] The defendant's counterclaim is dismissed with costs.